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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Communication No. 519/2012

Decision adopted by the Committee at its 53rd session (3–8 November 2014)

Submitted by:	T. M. (represented by counsel, Jae-Chang Oh)
Alleged victim:	The complainant
State party:	Republic of Korea
Date of complaint:	24 April 2012 (initial submission)
Date of present decision:	21 November 2014
Subject matter:	Expulsion to Myanmar
Procedural issues:	Abuse of the right to submission
Substantive issues:	Risk of torture upon return to the country of origin
Articles of the Convention:	3, 22

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Annex

Decision of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (fifty third session)

concerning

Communication No. 519/2012

Submitted by:	T.M. (represented by counsel, Jae-Chang Oh)
Alleged victim:	The complainant
State party:	Republic of Korea
Date of complaint:	24 April 2012 (initial submission)

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 21 November 2014,

Having concluded its consideration of complaint No. 519/2012, submitted to the Committee against Torture on behalf of Mr. T. M., under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the complainant, her counsel and the State party,

Adopts the following:

Decision under article 22, paragraph 7, of the Convention against Torture

1.1 The complainant is Mr. T. M., a national of Myanmar, born in 1972. He claims that his deportation to Myanmar would constitute a violation by the Republic of Korea of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel.

1.2 By note verbale dated 10 September 2012, the Committee informed the complainant that the Special Rapporteur on new communications and interim measures had decided not to issue a request for interim measures.

Factual background

2.1 In March 1988, large-scale demonstrations were held in Myanmar against the authoritarian regime of Ne Win, culminating on 8 August 1988 (an event known as "the 8888 Uprising"). At that time, the complainant was 16 years old and was a middle-school student. He was photographed while attending the anti-Government demonstrations of the 8888 Uprising. Two days later, soldiers came to the school and arrested him, without providing any explanations or serving an arrest warrant. The soldiers, who belonged to the

Chin minority, did not speak Burmese and beat him repeatedly, ignoring his explanations. The complainant, together with 48 other arrestees, was kept in police custody for half a day and was beaten and kicked; he still has some of the scars on his face. He was subsequently transferred to the Insein prison in Yangon, where no visits were allowed.

2.2 The prison conditions were deplorable. Eight persons were sharing a cell of about 10 m^2 and received only one plate of food for all eight persons per day. The complainant's parents came to visit him two or three times, but were not allowed to see him. Two months later, some of the inmates attacked a security guard bringing the meal. After taking possession of the prison keys, 50 inmates, including the complainant, escaped and went to Kili, Yangon, in stolen trucks. The complainant then went by fishing boat to Kawthoung, at the southernmost point of Myanmar. The following day, he took another boat to Ranong, where he illegally entered Thailand on 25 December 1988. He joined the Karen army and received military training for a month. He found the training physically too hard, so decided to leave and went to Chiang Mai, Thailand, where he worked in a Chinese restaurant owned by an acquaintance until October 1992.

2.3 In October 1992, he returned to Kawthoung, Myanmar, to visit his family. He helped his cousin with his business for six months. Thereafter he left for Thailand again in April 1993.

2.4 The complainant paid US$3,500 to a broker for a Myanmar passport on 1 April 1994. The passport was issued in the name "P. M. T." (not his real name, "T. M."), born in 1976. The complainant obtained visas from the Korean Embassy in Myanmar on 3 September 1994, and from the Thai Embassy in Myanmar on 16 September 1994. The official purpose for travel was his participation in a Hapkido tournament. He entered Korea and has been living illegally there since 26 October 1994.

2.5 The complainant applied for asylum only on 13 January 2004, on the advice of a friend. On 17 June 2009, the Ministry of Justice rejected his application, finding that he had failed to substantiate a well-founded fear of persecution. His appeal against the Ministry's negative decision was denied on 30 September 2009. On 4 November 2009, the complainant filed an application with the Seoul Administrative Court, which, on 1 April 2010, decided not to recognize him as a refugee. The Court held inter alia that, although Myanmar still holds many political opponents in detention, it is unlikely that the Government still punishes or persecutes those who participated in movements that overthrew the previous regime in 1988. Many people participated in the 8888 resistance, but the complainant did not personally participate, and was only arrested because he had been photographed when he had been following the rally on his way home after school. Furthermore, the court indicated that he had never taken part in political activities against the military government of Myanmar while abroad, and found it unlikely that he would be politically persecuted upon return to his country. As to the complainant's risk of being persecuted because of his escape from prison, the Court noted that the complainant was at that time a middle-school student and did not initiate the escape himself. The Court also noted his claim that the police searched for him at his parents' home on several occasions in 1992, but considered it unlikely that the authorities were still closely monitoring him more than 20 years later. The complainant's appeal against that decision was rejected by the Seoul High Court on 17 December 2010. The Supreme Court upheld the previous decisions on 1 February 2011.

The complaint

3. The complainant claims that in Myanmar he would risk being subjected to torture, and that his return would constitute a breach by the Republic of Korea of his rights under article 3 of the Convention. In support of his allegations, the complainant submits: (a) that the human rights situation in Myanmar is appalling and that a consistent pattern of gross,

flagrant or mass violations of human rights in a country does as such constitute a sufficient ground for determining that a particular person would be in danger of torture upon his/her return to that country; (b) that in the past, he had been arrested and detained without due process and was subjected to inhuman treatment while in prison; (c) that he had escaped from prison, which is a criminal offence in Myanmar; (d) that, up to 2008, summons had been issued against him; (e) that other persons in a similar situation have been arrested and tortured upon return to Myanmar.

State party's observations on admissibility

4.1 On 15 November 2012, the State party submitted its observations on the admissibility. It maintains that the communication represents an abuse of the right of submission within the meaning of article 22, paragraph 2, of the Convention. The State party submits that the complainant received an order of departure on 9 October 2009 after his appeal for refugee status had been denied. Thereafter, the complainant filed an administrative appeal requesting revocation of the denial of refugee status and stayed in the Republic of Korea while the examination of his appeal was pending. Deferral of his departure was denied on 22 July 2011. The State party notes that the complainant has been staying in the Republic of Korea illegally since July 2011 and that the order of departure against him is still valid. However, an order of deportation has never been issued against him. The State party explains that an order of departure under article 68 of the Immigration Control Act is issued instead of an order of deportation when a person expresses his will to voluntarily depart the country at his own cost and s/he is expected only to leave the territory of the Republic of Korea. Under the Immigration Control Act a person who receives a deportation order will be repatriated to the country in which s/he has nationality or citizenship. The State party further notes that, even in that case, the person may be deported to "another country to which he desires to be sent". In addition, in accordance with the principle of non-refoulement, s/he would not be deported to a country where s/he would be at risk of torture.

4.2 The State party submits that, given that an order of deportation has not been issued in respect of the complainant, the present complaint, alleging that the Republic of Korea is in violation of article 3 of the Convention only because the State party's authorities have denied his application for refugee status, constitutes an abuse of the right to submit a communication and that the complaint is therefore inadmissible under article 22, paragraph 2, of the Convention.

The complainant's comments on the State party's observations on admissibility

5.1 On 20 February 2013, the complainant points out that the State party has conceded in its observations that an order of departure has been issued against him. He notes that the State party's argument that the order of departure issued does not require the complainant to return to Myanmar, but rather requires him to depart, presumably, to a third country, fails to fully address the State party's non-refoulement obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, and under article 3 of the Convention against Torture.

5.2 In particular, the complainant notes that, in article 3, paragraph 1, of the Convention against Torture, it is stated in broad terms that "no State party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture". However, the State party's argument is that article 3, paragraph 1, prohibits a State party from returning an asylum seeker, but does not prohibit it from expelling him or her. The complainant submits that such an interpretation of article 3 of the Convention is clearly inconsistent with the purpose and is

contrary to the "spirit of the 1951 Convention and its 1967 Protocol, as well as to the international refugee law in general".

5.3 The complainant further submits that the Office of the United Nations High Commissioner for Refugees (UNHCR)has stated that the principle of non-refoulement must be given due regard when sending asylum-seekers to third countries and it requires (a) that a State party, at least, identify a country that will accept responsibility for examining the asylum request; (b) that the country's refugee status determination procedure is consistent with the 1951 Convention and its 1967 Protocol; (c) that sufficient safeguards are in place to prevent that country from sending an asylum-seeker/refugee to another country in violation of its non-refoulement obligations; and (d) that the asylum-seeker/refugee must be protected, as required by the 1951 Convention.

5.4 The complainant notes that, according to UNHCR, there is a grave risk that an asylum seeker's claim may not receive a fair hearing in third countries and that a refugee may be sent on, directly or indirectly, to persecution, in violation of the principle of non-refoulement and of article 33 of the 1951 Convention.

The State party's further observations on admissibility, as well as on merits

6.1 On 10 July 2013, the State party submitted its further observations. It reiterates that the complainant is not facing deportation to Myanmar, as an order of departure, rather than an order of deportation, was issued against him, requiring him to leave the Republic of Korea voluntarily without a designated destination country. For that reason, the State party submits that the complainant's present claim constitutes an abuse of the right of submission.

6.2 The State party further submits that the complainant used a forged passport with a temporary C-3 visa to enter the State party on 26 October 1994 and applied for refugee status only on 13 April 2004, in other words after living illegally for 10 years in the State party. It reiterates that the complainant's application for refugee status and his subsequent appeal were denied by the Minister of Justice and by the Seoul Administrative Court. The Administrative Court's negative decision was later upheld by the Supreme Court. The State party notes that the order of departure issued by the Minister of Justice is still valid.

6.3 The State party notes that the grounds for rejecting the complainant's application for refugee status recognition were the following: (a) that he has not participated in activities against the Government other than the demonstrations in which he participated in 1988 as a middle-school pupil; (b) that 20 years had passed since the 1988 democratic movement in Myanmar; (c) that he applied for refugee status 10 years after he entered the Republic of Korea; (d) that when the probability of persecution was examined in the light of his personal situation and the requirements under the Refugee Convention, it was considered to be significantly low.

6.4 The State party further maintains that, even if the complainant returns to Myanmar, he would not be at risk of being subjected to torture. It notes that, with regard to article 3, paragraph 2, of the Convention, the Committee has stated that both the general situation of the country in question and the danger faced by the complainant must be considered in order for him/her to receive protection as provided for under the principle of non-refoulement. The State party notes that the situation of human rights in Myanmar was considered to be serious in the past and that the United Nations General Assembly and the Human Rights Council have adopted annual resolutions on the subject. However, recent developments in Myanmar have brought about a wide range of positive changes in its human rights situation, which have been duly referred to in such resolutions since the 66th United Nations General Assembly in 2011.

6.5 The State party submits that, although nationals of Myanmar constitute the majority of refugees recognized by the State party's authorities owing to the past serious human rights violations in the country, there were no credible grounds for the complainant's claim that he would face persecution upon his return to Myanmar, and he was consequently denied refugee status. The State party believes that "such assessment made at the time of consideration of the complainant's application for refugee status ... remains valid in light of article 3 of the Convention". The State party also maintains that the complainant has failed to substantiate that he would personally be in danger of being subjected to torture if he returned to Myanmar.

6.6 The State party submits that, in his application for refugee status, the complainant claimed that he would be subjected to judicial action upon his return to Myanmar and would be sentenced to life imprisonment for escaping from prison in 1988. The State party notes that he has failed "to present any specific experience of being subjected to torture during the two months of his imprisonment" in Myanmar. At the domestic level, the complainant has never stated that his family in Yangon had been threatened or that he had been sought by the Myanmar authorities in relation to his participation in the demonstration in 1988 or to his escape from prison. The State party's courts also concluded that it was not likely that the complainant would be subjected to torture upon return to Myanmar, as the evidence mentioned by him, namely the summons which was issued in 2008, lacked credibility.

The complainant's further comments

7.1 On 22 January 2014, the complainant reiterates that the State party's attempts to differentiate a forced deportation and a forced departure is malapropos and confuses the State party's non-refoulement obligation under the 1951 Convention and its 1967 Protocol. He also reiterates that forced expulsion and forced return are prohibited under article 3 of the Convention and that UNHCR recognizes that there are problems associated with States parties expelling asylum seekers to third countries, including the risk that asylum seekers may be refused admission and may ultimately be sent, without their claims being examined, either to their country of origin or to another unsafe country. The State party's decision to expel the complainant is therefore a violation of its non-refoulement obligation, even if the decision does not require the complainant to return directly to Myanmar.

7.2 The complainant further acknowledges that he incorrectly used the term "deportation" instead of the phrase "forced departure" in his complaint to the Committee. Nevertheless, the complainant submits that he has not abused the right of submission since, even if the correct phrase "forced departure" is used in the context of his claim, the alleged violation of article 3 of the Convention and all other contentions made in the complaint still stand.

7.3 With regard to the risk of torture, the complainant submits that he faces a personal danger of torture if he returns, or is forcibly returned, to Myanmar. The evidence in support of the alleged risk is substantial, relates directly and personally to the complainant and is consistent with the recognized pattern of persecution and torture in Myanmar. In particular, the ongoing pattern of human rights abuses against political prisoners is well documented; the complainant was detained without due process and imprisoned for two months for allegedly, though not actually, participating in a peaceful demonstration in 1988; he escaped from prison and fled Myanmar and continues to live as a fugitive "from the Myanmar police and criminal justice system"; he has been issued with several summons since 1988, the latest of which was issued in 2008; and there have been cases of Myanmar citizens who were considered to be political targets and were arrested, imprisoned and tortured upon return to Myanmar. The complainant therefore has substantial grounds for believing that, upon his return to Myanmar, he will be sought by the Myanmar authorities

and will be imprisoned without trial and tortured. Finally, the complainant notes that, even if it is impossible to verify some of the aforementioned grounds and evidence independently, the stated facts and evidence as a whole indicate a reasonable probability that he faces a real and personal risk of torture in Myanmar.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claims contained in a communication, the Committee must decide whether it is admissible under article 22 of the Convention.

8.2 Preliminarily, the Committee notes the State party's argument that the complainant has abused the right to submit such a communication within the meaning of article 22, paragraph 2, of the Convention, since he has not been issued by the State party's authorities with an order of deportation but with an order of departure, which requires him to voluntarily leave the State party's territory. The complainant contested the State party's argument, asserting that an order of departure still entails expulsion within the meaning of article 3 of the Convention.

8.3 The Committee notes that, in order for there to be abuse of the right to raise a matter before the Committee under article 22 of the Convention, one of the following conditions must be met: the submission of a matter to the Committee must amount to malice or a display of bad faith or intent at least to mislead, or be frivolous; or the acts or omissions referred to must have nothing to do with the Convention.[1] In the present case, however, it cannot be ascertained that the complainant's present communication has been submitted in bad faith or is frivolous, as the matter of the complaint raises issues under article 3 of the Convention. For that reason, the Committee concludes that the complainant has not abused the right to submit such a communication within the meaning of article 22, paragraph 2, of the Convention.

8.4 The Committee has further ascertained, as required by article 22, paragraph 5 (a), of the Convention, that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement, and notes that, as required by article 22, paragraph 5 (b), of the Convention, domestic remedies have been exhausted.

8.5. Accordingly, the Committee finds no further objections to admissibility and declares the communication admissible, and proceeds to its consideration on the merits.

Consideration of the merits

9.1 In accordance with article 22, paragraph 4, of the Convention, the Committee has considered the present communication in the light of all information made available to it by the parties concerned.

9.2 In the present case, the issue before the Committee is whether the return of the complainant to Myanmar would constitute a violation of the State party's obligation under article 3 of the Convention not to expel or to return (refouler) a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

9.3 The Committee must evaluate whether there are substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon

[1] See for example communication No. 269/2005, *Salem* v. *Tunisia*, Views adopted on 7 November 2007, para. 8.4.

return to his country of origin. In assessing that risk, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim of the evaluation is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would be returned. It follows that the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient reason for determining that a particular person would be in danger of being subjected to torture on return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk. Conversely, the absence of a consistent pattern of flagrant violations of human rights does not mean that a person might not be subjected to torture in his or her specific circumstances.

9.4 The Committee recalls its general comment No. 1 (1997) on the implementation of article 3, according to which the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. While the risk does not have to meet the test of being "highly probable",[2] the Committee recalls that the burden of proof generally falls on the complainant, who must present an arguable case that he or she faces a "foreseeable, real and personal" risk.[3] While under the terms of its general comment the Committee is free to assess the facts on the basis of the full set of circumstances in every case, it recalls that it is not a judicial or appellate body, and that it must give considerable weight to findings of fact that are made by organs of the State party concerned.[4]

9.5 The complainant claims that he will be detained and tortured if he returns to Myanmar, as he was detained without due process after the events in August 1988 and subjected to inhuman treatment while in detention. He also claims that he is still being sought by the Myanmar authorities, as a summons was issued in his name in February 2008. The Committee notes the State party's submission that, in the present case, the complainant had not provided credible evidence and had failed to substantiate that there was a foreseeable, real and personal risk that he would be subjected to torture by the authorities if he returned to Myanmar, that his claims had been reviewed by the competent domestic authorities in accordance with the domestic legislation, and that the latter were not satisfied that the complainant fell within the categories of persons entitled to protection under the Refugee Convention.

9.6 The Committee is of the view that the complainant has not submitted any objective evidence whatsoever to substantiate that he would be at risk of being subjected to torture by the authorities if returned to Myanmar. It notes that the complainant has submitted only a copy of the summons, dated 28 February 2008; however that document was issued in the name of one P.Z. and not in the name of the complainant. Nor is there any medical evidence in the case file to corroborate the complainant's account of experiencing ill-treatment while in detention in 1988. The Committee also notes that, after the complainant left Myanmar and escaped to Thailand on 25 December 1988, he voluntarily returned to Myanmar in October 1992 and stayed there without experiencing any problems for six months, helping with the family business, before returning to Thailand in April 1993. The Committee further notes that the complainant does not claim that he has participated in any

[2] General comment No. 1 (1997) on the implementation of article 3 of the Convention in the context of article 22 (refoulement and communication), para. 6.

[3] Ibid. See also communication No. 203/2002, *A.R.* v. *The Netherlands*, Views adopted on 14 November 2003, para. 7.3.

[4] See, inter alia, communication No. 356/2008, *N.S.* v. *Switzerland*, decision adopted on 6 May 2010, para. 7.3.

political activities or movements opposing the Government of Myanmar, apart from the demonstration of 8 August 1988.

9.7 The Committee also notes the complainant's reference to the general human rights situation in Myanmar, underlining the ill-treatment of political activists, arbitrary arrests, disappearances and prison conditions. However, the Committee recalls that the occurrence of human rights violations in his/her country of origin is not sufficient in itself for it to be concluded that a complainant runs a personal risk of torture.[5]

10. In the circumstances, and in the absence of any other pertinent information on file, the Committee finds that the complainant has failed to provide sufficient evidence that, in the event of his return to his country of origin, he would face a foreseeable, real and personal risk of being tortured.

11. Accordingly, the Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the complainant's return to Myanmar would not constitute a breach of article 3 of the Convention.

[5] See for example No. 426/2010, *R.D.* v. *Switzerland*, decision of 8 November 2013, para. 9.2.